International Union of Operating Engineers, Local 12, AFL–CIO *and* Stief Co. West and Kasler Corporation; M.C.M. Construction; and Kiewit Pacific Co., Parties in Interest. Case 21–CC–3158

August 24, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

Upon a charge filed by Stief Co. West (the Employer) on August 12, 1992, amended on January 12, 1993, and duly served on International Brotherhood of Operating Engineers, Local 12, AFL–CIO (the Respondent), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on May 13, 1993, against the Respondent alleging that it had violated Section 8(b)(4)(ii)(A) of the National Labor Relations Act. The complaint was amended on October 8, 1993.

The complaint alleges that the Respondent filed grievances against three general contractors, each a signatory to the Respondent's master labor agreement (MLA), asserting that they violated the MLA by subcontracting the hoisting, lowering, placing, and removing of steel forms used in the barrier wall construction to the Employer, who is not a signatory to the MLA.[1] The complaint further alleges that the Respondent engaged in this conduct with an object of forcing the contractors to reaffirm an agreement prohibited by Section 8(e) of the Act, and thereby engaged in an unfair labor practice under Section 8(b)(4)(ii)(A). The Respondent filed an answer and an amended answer denying the commission of any unfair labor practices.

On August 31, 1993, the parties entered into a stipulation of facts, and on November 4, 1993, the parties submitted a motion to transfer proceedings to the Board. The parties waived a hearing before an administrative law judge and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and a Decision and Order, based on a record consisting of the charges, the complaint, the answer to the complaint, the order rescheduling hearing, the amendment to the complaint, and amended complaint, the answer to the amended complaint, the stipulation of facts, and the exhibits attached thereto. On February 25, 1994, the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel, the Respondent, and the Employer filed briefs with the Board.

The Board has delegated its authority in this proceeding to a three-member panel.

The issue presented by this case is whether the work at issue here, which was subcontracted by Kasler Corporation, M.C.M. Construction, and Kiewit Pacific Co. to the Employer, is ''jobsite work'' that is covered by the construction industry proviso to Section 8(e) of the Act.

The Board has considered the entire record stipulated by the parties and the parties' briefs and makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a California corporation, with its principal office and places of business in the State of California, at all material times has been engaged in providing boom truck services and other services to companies in the construction industry in southern California. The Employer annually furnishes services valued in excess of $50,000 to customers in the State of California, each of whom, in turn, annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of California. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We also find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

The Employer is a subcontractor engaged in the construction of concrete barriers on bridge and highway projects in the State of California. In the course of the construction process, the Employer uses boom trucks and tractors with cranes mounted behind their cabs. Heavy steel forms used in constructing the concrete barriers are transported to the construction site on the trailers and on the boom truck and are positioned and removed at the jobsite using the crane.

The Employer has never had a collective-bargaining agreement with the Respondent. As noted above, the Respondent has a collective-bargaining agreement (the MLA) with general contractors Kasler, M.C.M. Construction, and Kiewit Pacific.[2] The MLA contains grievance procedures to resolve jurisdictional disputes. From August 28, 1991, to August 19, 1992, the Respondent filed four grievances against the general contractors claiming that they subcontracted steel form hoisting, lowering, placing, and removal covered by the MLA to the Employer, a company that is not a party to the MLA, in violation of the subcontracting

[1] The Respondent also filed a Sec. 301 lawsuit to compel arbitration against Kasler Corporation regarding one of the grievances.

[2] Kasler, M.C.M. Construction, and Kiewit Pacific are members of the Associated General Contractors of California, Inc., who negotiated the MLA with the Respondent.

clause contained in article I of the MLA. The grievances involve: a Kasler project on Interstate 10 in Redlands, California; a Kasler project at Century Freeway and Crenshaw Boulevard in Los Angeles; an M.C.M. project at the Century and 710 Freeways in Los Angeles; and a Kiewit project on North Bristol Street in Santa Ana. In December 1991, the Respondent filed a Section 301 lawsuit to compel arbitration against Kasler concerning the grievance over the Interstate 10 project; the United States District Court, Central District of California, granted summary judgment in favor of the Respondent.

The MLA contains the following provisions:

> *Article I, Section B, Paragraph 10* Subcontracting, Employee Rights, Union Standards and Work Preservation
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> (a) The purposes of this Section 10 are to preserve and protect the work opportunities normally available to employees and workmen covered by this Agreement, maintenance and protection of standards and benefits of employees and workmen negotiated over many years and preservation of the right of Union employees, employed hereunder, from being compelled to work with non-Union workmen.
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> . . . .
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> (c) Neither the Contractor nor any of his Subcontractors shall subcontract any work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work coming within the jurisdiction of the Cement Masons, Laborers, Operating Engineers, Teamsters or Ironworkers except to a person, firm or corporation party to an appropriate labor agreement with the appropriate Local Union or Council of Laborers, Cement Masons, Operating Engineers, the International Brotherhood of Teamsters or Ironworkers.

Kasler, M.C.M., and Kiewit each subcontracted the construction of permanent concrete walls on freeway bridges, for the projects described above, to the Employer. The projects were estimated to take 6 months (Kasler-Redlands), 2 years (Kasler-Crenshaw), 2-1/2 years (M.C.M.), and 4 years (Kiewit) to complete. At the time the parties entered into the stipulation, the Kasler Interstate 10 project was 100 percent complete, the Kasler project at Century Freeway and Crenshaw Boulevard was 98 percent complete, the M.C.M. project was at least 98 percent complete, and the Kiewit project was approximately 13 percent complete.

The Employer was responsible at each project for constructing barrier walls on the decks of the freeway bridges, pursuant to contracts which generally called for the Employer to furnish all necessary materials and labor. The barrier walls are approximately 12 inches thick and 2 feet high, with a front wall facing the deck of the freeway and a back wall facing out over the freeway bridge. The barriers are constructed using 10-foot-long, and 3/4-inch-thick, steel forms weighing approximately 750 pounds each. The Employer generally joins three of these forms together and works with 30-foot-long sections.

The Employer transports the steel forms using boom trucks and tractors that each have a boom mounted behind the cab. A boom is a steel arm with a large steel hook connected to two chains ending with two smaller hooks. The boom is manipulated vertically and horizontally using levers mounted on a panel behind the cab of the trucks. Each of the boom trucks pulls a 20-foot trailer while each of the tractors pulls a 45-foot trailer.

The barrier wall construction process at each of the projects is substantially the same. The Employer employs drivers represented by the Teamsters to transport the steel forms to and from the project. The forms are initially delivered from the Employer's own yard to the general contractor's storage yard and are thereafter moved between the jobsite and the storage yard as needed. The driver arrives at the project in the morning and drives a load of forms to the place at the construction site where they will be used. The driver meets the Employer's composite crew at the construction site. The composite crew is typically made up of one foreman, two laborers, one carpenter, and one cement mason. The foreman instructs the crew and driver about where the steel forms will be set that day. The driver then gets into the boom truck and, starting in the place where the first barrier will be constructed, slowly drives along the deck about 300 feet. The composite crew walks behind the boom truck unloading hardware used to fasten the forms to the decking. After the hardware is laid out, the composite crew goes back and secures it to the deck.

The driver next returns the boom truck or tractor to the place where the first form will be placed. The driver manipulates the levers on the control panel to raise the boom and to lower it above the first form on the truck or trailer that is to be removed. A laborer from the composite crew attaches the small chain hooks into the eye-holes on the lengthwise ends of a steel form. The driver then raises the form from the trailer and moves the form above the location on the concrete deck where it will be placed. Two members of the composite crew stand on either end of the form to guide it to the deck and to prevent swinging. The driver next lowers the form to the deck. The composite crew aligns the form on the deck, a laborer unhooks the chains, and the driver raises the boom and swings it to the next form on the trailer. A laborer connects the chains to the next form, the form is lifted by the driver manipulating the boom, and the form is swung over to the appropriate place on the deck. After the

second form is placed, the composite crew starts connecting the forms together lengthwise. This process is repeated until 300 feet of front forms are set in place.

After the front forms have been set, all of the back forms are hoisted and placed in their final positions on the deck, approximately 12 inches behind the front forms. After each back form is placed, the composite crew attaches hardware to the front and back panels to connect them together. Final placement of 300 feet of front and back forms creates a mold for the first portion of the barrier wall. Creating the mold takes most of a morning. After lunch, the composite crew and driver go back to the forms that were set earlier and pour concrete into the barrier molds. At the end of the day, the driver transports any leftover forms to the storage yard.

The next day, the driver picks up the trailer and any needed forms from the storage yard and proceeds to the construction site. The driver drives the truck to the place on the deck where the barrier walls were poured the day before, swings the boom over the first form that was placed, and lowers the chains on the boom down to the form. The composite crew connects the chains on either side of the form and the driver pulls the form away from the newly made wall. The composite crew then scrapes any remaining concrete from the form and sprays an oil-like substance on the form. The driver raises the boom and swings the form back onto the trailer, and then drives the truck to the place along the wall where the form needs to be placed to create the next mold. The process of stripping the new walls of the forms is repeated until all of the forms are stripped. If a form is not needed again that day, it is set on the trailer and transported back to the storage yard.

When the barrier walls are dry, the exterior and interior of the walls are finished to rid the walls of excess concrete. According to the stipulated facts, a driver was involved in the finishing process only of the exterior portions of the walls at one of the Kasler projects. The driver used the control panel levers to hoist a man cage over the exterior walls so that a composite crew member could sand blast them.

Forms are often transported to or from a project, during the course of the project, because they are needed at other projects. When the projects are completed, the forms are taken back to the Employer's yard or are delivered to other Employer projects. The forms never become permanent fixtures of a project. The parties stipulated that there is no special training program or apprentice program for drivers to train them to operate the boom control panel, or for many of the Employer's other employees who performed work at the Kasler, M.C.M., and Kiewit projects.

B. *The Parties' Contentions*

The General Counsel and the Employer contend that the Respondent violated Section 8(b)(4)(ii)(A) of the Act which makes it unlawful for a union to coerce an employer to enter into an agreement that is prohibited by Section 8(e). Section 8(e) of the Act makes it an unfair labor practice for an employer and a union to enter into an agreement whereby the employer agrees to refrain from doing business with any other person. The General Counsel and the Employer argue that the Respondent violated Section 8(b)(4)(ii)(A) by filing grievances against Kasler, M.C.M., and Kiewit, as well as a lawsuit against Kasler, in an effort to force those general contractors to reaffirm the subcontracting provision of the MLA as applied to the work at issue here, and thereby to enforce an agreement to cease doing business with the Employer—an agreement unlawful under Section 8(e).[3]

The Respondent contends that it has not violated the Act because, it argues, the process of hoisting, lowering, placing, and removing the steel forms falls within the construction industry proviso of Section 8(e), which states:

> *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of *work to be done at the site* of the construction, alteration, painting, or repair of a building, structure or other work. [Emphasis added.]

The General Counsel and the Employer, on the other hand, argue that the hoisting, lowering, placing, and removing of the steel forms constitute the final act of delivery of the forms and thus do not fall within the proviso. For the reasons discussed below, we find that the work at issue is jobsite work.

C. *Analysis and Conclusions*

Initially, we note that the work subcontracted to the Employer, the erection of concrete highway bridge barrier walls, is plainly ''work actually to be done at the construction jobsite.'' *Carpenters District Council (Cardinal Industries)*, 136 NLRB 977, 988 (1962). Thus, each of the contracts between the Employer and the general contractor provide that the Employer will furnish the labor and materials necessary to erect the barrier walls at the specified location. Likewise, the specific work addressed in the grievances, the hoisting and placing of the steel forms by the Employer's driver, also was performed at the site of construction.

We find no merit to the argument, advanced by the Employer and the General Counsel, that the work at

[3] It is the General Counsel's position that the subcontracting provision of the MLA is not *facially* unlawful.

issue falls outside the proviso because the driver also transported the forms to and from the jobsite. In this regard, we recognize that, based on the legislative history of the proviso to Section 8(e), the Board has found that the proviso does not apply to various types of transportation work. See *Joint Council of Teamsters No. 42 (AGC of California)*, 248 NLRB 808 (1980), enfd. sub nom. *Teamsters Joint Council No. 42 v. NLRB (California Dump Truck Owners Assn.)*, 671 F.2d 305 (9th Cir. 1981), amended 702 F.2d 168 (9th Cir. 1981), cert. denied 464 U.S. 827 (1983).[4] Thus, the Board has found that the mixing, delivery, and pouring of ready-mix concrete,[5] the delivery of precast concrete pipe,[6] the transportation of tools, materials, and personnel to and from a construction site,[7] the delivery of sand fill,[8] and the haulage of waste[9] are not jobsite work.

However, we find that the work at issue here is distinct from the foregoing examples and falls within the Board's narrow definition of jobsite work. Although the Employer's boom truckdrivers occasionally transport forms to and from the jobsite during each highway project, this transportation work is only an incidental part of the drivers' duties. (Indeed, the Union's grievances do not even expressly encompass this work.) Their principal task throughout each project (lasting from 6 months to 4 years) is to operate the boom truck on the jobsite. They repeatedly and continuously hoist, lower, place, and remove steel forms as an integral part of the process of constructing barrier walls. While performing this work, the drivers are as much a part of the construction crew as any of its other members, and neither the General Counsel nor the Employer contends, nor could they reasonably contend, that these other employees are not performing jobsite construction work.

This case is clearly distinguishable from *Inland Concrete*, supra, and *Island Dock*, supra, on which the General Counsel principally relies. In *Inland Concrete*, the use of a boom truck to lower and place precast concrete pipes into a ditch constituted a final act of delivery, rather than jobsite work, and the pipes were products that, once delivered and deposited into the ditch, became permanent fixtures on the site. Here, by contrast, the forms are lowered, placed, connected, and used as a mold over and over again in the construction of the barrier walls, and ultimately are removed for use by the Employer for use on its other projects. Thus, as the Respondent suggests, the steel forms are more akin to tools and equipment used continuously by employees at the site than to materials, products, or supplies that are simply delivered by a driver whose contact with workers at the site is incidental to that delivery.[10] For similar reasons, the work here differs from the mixing and pouring of concrete involved in *Island Dock*. The Board there held (145 NLRB at 491) that the work at issue was merely the final act of delivery because ''liquid concrete, by its nature, cannot be dumped on the ground at the construction site like other materials.'' Accord: *Inland Concrete*, 225 NLRB at 216. In contrast, steel forms could be dumped on the ground at the construction site, where they could *then* be picked up by workmen like the boom truck drivers involved here and used repeatedly in the very distinct work of constructing the concrete barriers.

For the reasons discussed above, we find that hoisting, lowering, placing, and removing steel forms is jobsite work that is covered by the construction industry proviso of Section 8(e), and that the Respondent did not violate Section 8(b)(4)(ii)(A) by attempting to enforce the subcontracting provision of the MLA with respect to that work. Accordingly, we shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. Stief Co. West is an employer engaged in commerce or a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. The hoisting, lowering, placing, and removing of steel forms at issue in this case constitutes work to be done at the construction site and falls within the first proviso to Section 8(e) of the Act.

4. The Respondent did not violate Section 8(b)(4)(ii)(A) of the Act by filing grievances against

[4] As the Board recognized in *Teamsters No. 42 (AGC of California)*, the legislative history of Sec. 8(e) reveals that a primary motivation for the enactment of the proviso was the desire to ''prevent potential labor strife between union and nonunion personnel working at the same jobsite.'' Id. at 815. Thus, these concerns are not implicated by the temporary presence on the jobsite of delivery personnel. Id.

[5] *Teamsters Local 294 (Island Dock Lumber)*, 145 NLRB 484 (1963), enfd. 342 F.2d 18 (2d Cir. 1965).

[6] *Joint Council of Teamsters No. 42 (Inland Concrete Enterprises)*, 225 NLRB 209 (1976).

[7] *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673 (1972).

[8] *Teamsters Local 294 (Rexford Sand & Gravel)*, 195 NLRB 378 (1972).

[9] *Teamsters No. 42 (AGC of California)*, supra, 248 NLRB at 817.

[10] In this regard, we note that many if not all skilled workers transport their own tools onto the jobsite in connection with their jobsite construction work. This transportation function has not been found to require the exclusion of these individuals from the proviso's protection, however, because they also are engaged in the ''construction, alteration, painting, or repair of a building, structure, or other work,'' 29 U.S.C. § 158 (e), and thus have a close and continuing contact with the other employees at the jobsite. For the same reasons, we find that the work at issue in this case is jobsite work and we note that, in light of the close and continuing contact between the driver and the rest of the Employer's composite crew, and the entire crew's continuous presence at the jobsite, our finding that the disputed work is protected by the proviso is consistent with the congressional intent in enacting the proviso, as set forth above.

Kasler, M.C.M., and Kiewit, or by filing a Section 301 lawsuit against Kasler, in an effort to enforce the subcontracting provision of the MLA.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board orders that the complaint is dismissed in its entirety.